Supreme Court, U. S.
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No. 79-1956

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

CLEAN LAND AIR WATER CORPORATION,
Petitioner,

v.

WASTE SYSTEMS, INC. AND
ROLLINS ENVIRONMENTAL SERVICES, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, WASTE SYSTEMS, INC. IN OPPOSITION

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OPINIONS BELOW

The opinions delivered in the courts below are appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Was there a failure by the district court to correctly apply and construe 28 U.S.C. Sec. 1404(a), or to consider the relevant factors incident to a ruling upon a motion to transfer, or was there a clear abuse of discretion on its part.

Was there a clear abuse of discretion on the part of the court of appeals.

STATUTORY PROVISION

United States Code, Title 28: Sec. 1404, Change of Venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

ARGUMENT

It is well established that the moving party in a motion for transfer under 28 U.S.C. Sec. 1404(a) has a heavy burden, in that it must make a "clear cut showing that when all interests are considered, trial would more conveniently proceed and the interests of justice would be better served in the other district." *Riso Kagako Corp. v. A. B. Dick Co.*, 300 F. Su-p. 1007 (S.D.N.Y. 1969). The interests to be considered in passing on the motion are the convenience of the parties and witnesses, and the promotion of justice. CLAW has not sustained its burden pursuant to this provision.

I.

A movant does not satisfy its burden where it fails to support the motion with affidavits, depositions, or other documents establishing the requisite elements for transfer. *See Plum Tree, Inc. v. Stockment,* 300 F.2d 754 (3d Cir. 1973).

Petitioner submitted an affidavit to the District Court containing the names of witnesses who would be subject to subpoena only if the case were transferred to the Middle District of Louisiana. However, with the exception of one individual who allegedly saw a check payable to Donald Antie, the descriptions of the testimony to be offered indicate only that the named witnesses may possess information relevant to the CLAW-ROLLINS litigation rather than the action by WSI against CLAW.

To date, the showing as against Waste Systems, Inc., consists of conclusory assertions in CLAW's petition to the effect that WSI has only four (4) witnesses and that denial of the transfer would cause unidentified witnesses "crucial and necessary" to petitioner's cause in the WSI-CLAW litigation to be without the subpoena power of the Eastern District of Texas. It is evident that CLAW is urging a transfer without any consideration for the convenience of WSI or its witnesses.

II.

The net effect of granting a transfer would be to shift the inconvenience attendant to this action to the shoulders of the original plaintiff, WSI, and its witnesses. The plaintiff's choice of forum is a paramount consideration in any transfer request, and should not be disturbed unless the balance of convenience is strongly in favor of the defendant. *Shutte v. Armso Steel Corp.,*

431 F.2d 22 (3d Cir. 1970), *cert. denied,* 401 U.S. 910 (1971). This Court recognized that a transfer will not lie where it will effect a mere shifting of inconvenience when it stated that "1404(a) provides for a transfer to a more convenience forum, not a forum equally convenient or inconvenient." *Van Dusen v. Barrack,* 376 U.S. 612 (1964).

If venue is changed to the Middle District of Louisiana, witnesses and records critical to WSI's actions against both Rollins and CLAW will be without the subpoena power of that Court. Those witnesses who voluntarily attend trial will be greatly inconvenienced. Preparation for a local trial will be put to waste. Further, WSI will be prejudiced in that employees essential to its operations will be forced to attend a distant forum for an indeterminate length of time.

III.

To the extent that Louisiana law may be applicable to the issues in controversy, said factor does not militate in favor of a venue change. Transfers on the basis that foreign law must be applied are disfavored unless the law is unclear or there is some difficulty in its application. *See Calva v. American Air Lines, Inc.,* 177 F. Supp. 238 (D. Minn. 1959). Louisiana law governing the interpretation of contracts, capacity to contract, and the sale of property is relatively clear, and obviously does not warrant a change of forum.

IV.

The decision of the lower courts did not constitute abuses of discretion. In *A. J. Industries v. United States Dist. Ct. C.D. of Cal.,* 503 F.2d 384 (9th Cir. 1974), failure of the trial court to even issue an opinion stating

its reasons for granting a transfer was held not to constitute an abuse of discretion, where briefs and transcripts of the hearing indicated that all issues were before the court and that the court took ample time to consider them. Both CLAW and Rollins submitted memoranda with respect to the motion. The court was well apprised of the legal issues and facts. Moreover, the court issued an opinion in which it concluded that transfer would only result in a shifting of inconvenience with respect to the parties and witnesses. Clearly, failure of the district court to articulate the specific facts which support its conclusions was not a clear abuse of discretion, and CLAW's contention is therefore without merit. In essence, petitioner's position is that the court erred by taking cognizance of WSI's interests in this litigation.

V.

As a delaying tactic, a 1404(a) motion is unsurpassed. WSI filed suit on August 2, 1978, yet CLAW did not move for change of venue until September 24, 1979. Respondent believes that any inconvenience borne by CLAW is far outweighed by the public interest in the resolution of this litigation.

CONCLUSION

CLAW has failed to demonstrate that WSI's action in the Eastern District of Texas is so inconvenient as to warrant a change of venue. In effect, CLAW seeks to shift the inconvenience inherent in this matter to the plaintiff and its witnesses. The facts of this case simply do not call into play 28 U.S.C. Sec. 1404(a). Furthermore, the delay and additional expense caused by appeal of this motion are not consonant with the premises of

judicial economy and justice upon which 28 U.S.C. 1404(a) is founded. For these reasons, WSI respectfully requests that CLAW's petition for a writ of certiorari be denied.

Respectfully submitted,

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